

SENATE RECORD VOTE ANALYSIS

105th Congress
2nd Session

Vote No. 309

October 8, 1998, 5:29 p.m.
Page S-11884 Temp. Record

FLETCHER NOMINATION/Circuit Judge

SUBJECT: Nomination of William A. Fletcher, of California, to be a United States Circuit Judge for the Ninth Circuit. Confirmation.

ACTION: NOMINATION CONFIRMED, 57-41

SYNOPSIS: William A. Fletcher was born June 6, 1945, in Philadelphia, Pennsylvania. He received a B.A. from Harvard College in 1968, a B.A. from Oxford University in 1970, and a J.D. from Yale Law School in 1975. His employment history includes the following: law clerk, 1975-1976, Judge Stanley Weigel, United States District Court for the Northern District of California; law clerk, 1976-1977, Justice William Brennan, Jr., United States Supreme Court; and law professor, 1977 to present, University of California, Berkeley School of Law.

Those favoring confirmation contended:

Professor Fletcher is eminently qualified to serve on the Ninth Circuit. He graduated magna cum laude from Harvard, he was a Rhodes scholar, and he was a law clerk for Supreme Court Justice Brennan. As a professor, he has expressed some liberal legal views and he has written some articles that may push the envelope of established thinking on the law, but he has remained well within the bounds of mainstream opinion. In fact, even many conservatives have endorsed him because his articles have been characterized by very precise historical and contextual analyses. We do not expect him to be a conservative judge, but neither do we expect him to issue the type of errant unconstitutional decisions that have unfortunately been all too common from the Ninth Circuit. Senators who support this nominee, whether liberal or conservative, agree that he will not make this liberal, activist circuit more liberal and more activist. Many of us who support confirmation are bothered by the fact that his mother also serves as a judge on the circuit, but we are satisfied by his mother's assurances that she will go on senior status once her son is confirmed. We are confident that William Fletcher will serve admirably. We are pleased to vote in favor of his confirmation.

(See other side)

YEAS (57)			NAYS (41)		NOT VOTING (2)	
Republicans (14 or 25%)	Democrats (43 or 100%)		Republicans (41 or 75%)	Democrats (0 or 0%)	Republicans (0)	Democrats (2)
Bennett	Akaka	Kennedy	Abraham	Hutchinson		Glenn- ²
Chafee	Baucus	Kerrey	Allard	Hutchison		Hollings- ²
Collins	Biden	Kerry	Ashcroft	Inhofe		
D'Amato	Bingaman	Kohl	Bond	Kempthorne		
Domenici	Boxer	Landrieu	Brownback	Kyl		
Gorton	Breaux	Lautenberg	Burns	Lott		
Hatch	Bryan	Leahy	Campbell	McCain		
Jeffords	Bumpers	Levin	Coats	McConnell		
Lugar	Byrd	Lieberman	Cochran	Murkowski		
Mack	Cleland	Mikulski	Coverdell	Nickles		
Roth	Conrad	Moseley-Braun	Craig	Roberts		
Smith, Gordon	Daschle	Moynihan	DeWine	Santorum		
Specter	Dodd	Murray	Enzi	Sessions		
Stevens	Dorgan	Reed	Faircloth	Shelby		
	Durbin	Reid	Frist	Smith, Bob		
	Feingold	Robb	Gramm	Snowe		
	Feinstein	Rockefeller	Grams	Thomas		
	Ford	Sarbanes	Grassley	Thompson		
	Graham	Torricelli	Gregg	Thurmond		
	Harkin	Wellstone	Hagel	Warner		
	Inouye	Wyden	Helms			
	Johnson					

EXPLANATION OF ABSENCE:

- 1—Official Business
- 2—Necessarily Absent
- 3—Illness
- 4—Other

SYMBOLS:

- AY—Announced Yea
- AN—Announced Nay
- PY—Paired Yea
- PN—Paired Nay

Those opposing confirmation contended:

This nominee does not deserve to be confirmed. His qualifications to serve as a circuit judge are questionable, he has extreme, unconstitutional views on the role of the judiciary, his appointment violates the law because he will be serving on the same circuit as his mother, and he has been nominated to serve on the Ninth Circuit, which is the worst circuit already in America and which therefore can ill afford to have another activist judge.

Our first concern is that he has almost no judicial experience. He has never served as a judge, nor has he even spent any time in a court room as either a prosecutor or a defense attorney. He has been a law clerk and a law professor, but he himself has never practiced law. Though it is certainly not disqualifying in itself, we would much prefer to have someone with more practical experience to appoint to a circuit court, which is just one step under the Supreme Court.

Our second area of concern is that he will prove to be an extreme judicial activist. First, he served as a law clerk for Supreme Court Justice Brennan, and has written that he considered that Justice a "national treasure." We by no means share that view of Justice Brennan. During his long tenure on the court he regularly ignored the plain meaning of the Constitution in order to suit his own personal policy preferences. For example, even though the Constitution makes several specific references to crimes that merit the death penalty, he consistently maintained that the Constitution banned the death penalty because it constituted "cruel and unusual punishment." William Fletcher has also written that legislation to give life sentences to three-time repeat violent offenders is "perfectly dreadful legislation." Those laws which have been recently enacted in many jurisdictions have been very effective in lowering crime rates. Most criminals are not repeat offenders, and most repeat offenders never reform. The vast majority of Americans do not consider it "perfectly dreadful" that 3-time loser laws have prevented countless violent crimes from occurring, nor do we. We wish liberals like William Fletcher would show more concern for law-abiding Americans than for criminals. Another area of concern that we have is that he wrote approvingly of judges taking over legislative and administrative functions, such as to run prisons. Specifically, he wrote: "The only legitimate basis for a Federal judge to take over the political function in devising or choosing a remedy in an institutional suit is a demonstrated unwillingness or incapacity of the political body." That formulation may sound limiting, but in practice we think it leaves too much discretion with a judge. Suppose a judge orders a prison to build a larger law library or to provide more frequent and varied meals? As a matter of policy, State authorities may disagree with those policy decisions and refuse; in that case, William Fletcher believes that the judge has the right to have the court take over the prison. Judges have been very active in making detailed decisions for prisons, schools and other institutions. This nominee seems to support that activism.

Our third area of concern is that he will be serving on the same circuit as his mother (who is regarded as one of the most liberal activist judges, if not the most liberal active judge, on the circuit). Putting him on this circuit would violate an anti-nepotism statute. We support that statute. Circuit judges hear cases in three-judge panels. People who have cases before such panels have a right to have their cases heard by three independent judges. They do not want any personal relations between those judges to exist that might sway their judgment. Any decision made by a panel that had a mother and a son sitting as judges would be suspect if the mother and son voted one way and the third judge voted the other. We understand that William Fletcher's mother has agreed to take senior status should her son be appointed, but that will only relieve her of administrative responsibilities; she will still rule on cases.

Our final area of concern is that we are talking about the Ninth Circuit. That Circuit is much too large, which has made it difficult to develop any collegiality. As a result, judges have not developed common legal approaches to their decisions, and they are often even unaware of each other's decisions. The case law that has developed from this situation is often conflicting within the Circuit. Further, as judges have learned to act as laws unto themselves, they have frequently made unconstitutional decisions. It is by far the most reversed court in the country. Many more of its decisions would no doubt be reversed if the Supreme Court had time to consider all of the horrendous decisions that are routinely made by its judges. The New York Times recently noted that a majority of the Supreme Court considers the Ninth Circuit to be a "rogue circuit, out of control." If we put another nominee on this circuit who actively interprets the Constitution to mean whatever he wants it to mean, we will only be making matters worse.

Professor Fletcher may be a very fine professor, but we have ample reason to believe that he is a poor choice to be a circuit judge. Putting another unacceptable judge on the Ninth Circuit, which is already out of control, would be especially damaging. We therefore urge our colleagues to oppose confirmation of this nominee.